

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. CR 1:20-01864-001 KWR

ROBERT BENJAMIN NELSON,

Defendant.

**DEFENDANT'S OBJECTIONS TO PRESENTENCE REPORT**

COMES NOW, Defendant, Robert Nelson, by and through his attorney of record Assistant Federal Defender, Devon M. Fooks and hereby objects to paragraph 31 of the Presentence Report which grants a 6-level enhancement to the final offense level pursuant to U.S.S.G. § 3A1.2(b).

ARGUMENT

Mr. Nelson objects to paragraph 31 of the presentence report to the extent that it grants a 6-level enhancement to Mr. Neslon's final offense level for official victim.

U.S.S.G. §3A1.2 states

(a) If (1) the victim was (A) a government officer or employee; (B) a former government officer or employee; or (C) a member of the immediate family of a person described in subdivision (A) or (B); and (2) ***the offense of conviction was motivated by such status***, increase by **3** levels.

(b) If subsection (a)(1) and (2) apply, and the applicable Chapter Two guideline is from Chapter Two, Part A (Offenses Against the Person), increase by **6** levels.

U.S.S.G. § 3A1.2 (emphasis added). In the present matter the 6-level enhancement does not apply because Mr. Nelson, while motivated by the fact that Jane Doe was law enforcement, was not motivated by the fact that she was a federal officer because he did not know that she was a federal officer at the time.

In *United States v. Kohut*, 553 F.Supp3d 964, Judge Browning addressed this issue. In *Kohut* the defendant assaulted a United States Postal Worker who was delivering mail. The defendant objected to the 6-level enhancement pursuant to §3A1.2(a) and the government agreed. The United States contended that Kohut “knew A.E. was a postal employee because he was wearing a postal uniform, a postal vehicle [was] nearby, and A.E. was delivering mail.” Memo. Response at 10. The United States agrees, however, that Kohut “was not motivated by the postal worker's status as a government employee.” Objections Response at 2. “It seems that Defendant wanted a cigarette from anyone nearby regardless of the victim's status as a postal employee.” Memo. Response at 10.

Section 3A1.2(a) does not apply if the defendant does not know of the victim's official status, “because the guidelines’ language explicitly requires knowledge.” *United States v. Solorzano*, 832 F. Appx. 276, 282 (5th Cir. 2020). See *United States v. Rivera-Alonzo*, 584 F.3d 829, 836 (9th Cir. 2009)(“The key factors are knowledge of the victim's official status and assaultive conduct motivated by that knowledge.”). For instance, in *United States v. Solorzano*, the Fifth Circuit concluded that the defendant “was not motivated by” the officer's “official status,” because “[h]e did not know” that the officers “were federal officers when he shot at them”:

Throughout this encounter [the officers] drove unmarked vehicles, wore plain clothes, and never informed [the defendant] that they were law enforcement. [A co-defendant] testified at trial that he and [the defendant] did not know they were firing at law enforcement officers. [One of the officers] himself recognized on cross-examination that [the defendant] had no reason to believe they were officers.

*United States v. Solorzano*, 832 F. Appx. at 282. In *United States v. Rivera-Alonzo*, the United States Court of Appeals for the Ninth Circuit held that a district court enhanced properly a sentence under U.S.S.G. § 3A1.2 where the defendant saw a Border Patrol agent in uniform, attempted to run away, eventually dove at the agent's feet, tackled him, and took the agent's gun before being subdued by another agent. See *United States v. Rivera-Alonzo*, 584 F.3d at 837 (“The ‘Official Victim’ enhancement

does not require that a defendant harbor any particular ill-will towards federal agents. It is enough that a defendant knows that the victim is a federal officer and then assaults the officer in an attempt to get away or evade capture.”)

In the present matter, Jane Doe was wearing her state issued uniform and driving a state issued vehicle. She was performing a routine traffic stop. Prior to the shooting, Mr. Nelson had no conversation with Jane Doe and a review of Jane Doe’s dash cam clearly shows that there was no time for Jane Doe to identify herself as a federal officer.

Accordingly, the 6-level enhancement cannot apply because Mr. Nelson’s actions were not motivated by the fact that Jane Doe was a federal officer.

WHEREFORE, Mr. Nelson objects to the 6-level enhancement as applied in paragraph 31 of the presentence report.

Respectfully submitted,

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/s/ filed electronically on 9/5/23

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